

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

CIRSAN REALTY TRUST

v.

WOBURN BOARD OF APPEALS

No. 01-22

DECISION

June 11, 2003

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)	
CIRSAN REALTY TRUST,.)	
Appellant)	
)	
v.)	No. 01-22
)	
WOBURN BOARD OF APPEALS,)	
Appellee)	
_____)	

DECISION

I. PROCEDURAL HISTORY

In October 2000, the Cirsan Realty Trust submitted an application to the Woburn Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable rental housing off Main Street in Woburn, to be financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston. By decision filed with the City Clerk on October 11, 2001, the Board denied the permit. From this decision the developer appealed to the Housing Appeals Committee. The Committee held a conference of counsel, conducted a site visit, and held six days of de novo evidentiary hearing, with witnesses sworn, full rights of cross-examination, and a verbatim transcript.¹

1. The Committee issued a joint Pre-Hearing Order (Apr. 11, 2002), agreed to by the parties. In it, the parties stipulated that the developer satisfies the jurisdictional requirements found in 760 CMR 31.01(1), that is, that it is a limited dividend organization, that it controls the site, and that it is fundable by a subsidizing agency. Pre-Hearing Order, §§ I-4 through I-7. The Board also conceded that Woburn has not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, § I-3.

Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL BACKGROUND

The developer proposes to build a six-story, 168-unit apartment building on a 9-acre site at 1042 Main Street (Route 38) in Woburn. It will contain 60 one-bedroom apartments and 108 two-bedroom apartments. The site is zoned mostly for two-family residences (R-2), though a small area is zoned for single family residences (R-1). Municipal water and sewer service is available to the development. Pre-Hearing Order, §§ I-2, I-8 through I-10; Tr. I, 26, 28-30.

The housing is proposed for the top of a portion of a steep, hilly ridge. The ridge is north of Main Street, which runs parallel below it. Exh. 14. In relatively flat locations immediately adjacent to Main Street before the hill begins to rise are existing one- and two-family houses, typically on quarter-acre and larger lots. Exh. 14; Tr. I, 30. The top of the hill is approximately 80 feet above Main Street.² Tr. I, 32, 137. The developer owns 188 feet of frontage along the street, and a much larger area of the ridge above and behind the existing houses. Exh. 14; Tr. I, 76. He proposes to build a winding roadway to the top of the ridge, alter that area significantly by means of blasting, and construct the apartment building. Exh. 9. Though the building has two levels of underground parking, there are also parking lots on two sides of the building; there is a smaller amount of area set aside for tennis courts and other recreational use. Exh. 9; Tr. I, 41.

2. Eighty feet represents the approximate rise on the steepest portion of the hill to what will be ground level at the base of the new building. The rise to the very highest existing point on the hill is 130 feet. Tr. I, 42.

III. ISSUES

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a prima facie case by showing that its proposal complies generally with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern, which supports the denial, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988). As will be seen, our analysis of each of the local concerns raised by the Board leads us to conclude that the Board has failed to meet its burden.

The board raised six local concerns to justify its denial of the comprehensive permit. As enumerated in the Pre-Hearing Order, two of these are related to impacts on the surrounding area, that is, the effects of blasting during and after³ construction and of increased traffic. Four concerns relate to the adequacy of elements of the proposed design, that is, of the intersection of the development's access roadway with Main Street, of the

3. The Pre-Hearing Order mentions not only the hazard of blasting, but also "undue 'disfigurement.'" It is not clear whether the Board's concern was about the change in the contour of the hill or about disfigurement that might be caused by changes in stormwater runoff caused by the blasting. See Tr. I, 73. No testimony was presented regarding the former. There had apparently been concern about possible flooding on the south side of Main due to stormwater runoff. See Tr. I, 78-81. Flooding was not raised as an issue in the Pre-Hearing Order, and the developer's expert's testimony concerning stormwater management puts to rest any question about disfigurement of the hillside due to runoff. Tr. I, 35-38, 78-93. In any event, the Board did not brief the matter of disfigurement from either of these perspectives, and it is therefore waived. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d

roadway itself, of emergency access, and of on-site parking. Pre-Hearing Order, § II-1.

The developer presented testimony from expert engineers concerning each of these issues, and thereby established a prima facie case that the proposal complies with generally recognized professional standards in each area. Tr. I, 42-63 (fire truck, access, parking, emergency access); II, 15-27 (blasting); II, 59-74, 82-83 (traffic volume); Tr. II, 75-80, 83 (intersection design). In response, the Board presented testimony from its own experts and from public officials.

A. Blasting

The design requires the removal of a very large amount of soil and underlying rock—about 120,000 cubic yards. Tr. I, 115, 119; Exh. 1, p. 4. Final testing has not been completed, but it is likely that a large percentage of this will be rock.⁴ Tr. I, 117; II, 15. Certainly this is a large amount, but not unheard of. The developer's expert geotechnical engineer testified that he has been involved in several projects of similar size, including a recent project that involved in blasting 200,000 cubic yards of rock for construction of a high school. Tr. II, 9. The same expert testified not only with regard to the specific blasting and other soil and rock removal procedures that will be used, but also specifically that all state blasting regulations will be followed. Tr. I, 19, 15-27. At a more fundamental level, blasting

595, 598 (1995). Similarly, no issue with regard to landscaping of the top of the hill or whether sufficient open space remains there was raised in the Pre-Hearing Order or during the hearing.

4. The Board has argued that insufficient subsurface testing had been done to allow it to evaluate the blasting plans during local proceedings, or to allow this Committee to do so on de novo appeal. Building construction, however, is not like septic system construction, where unanticipated subsurface conditions may throw the feasibility of the entire design into question. We accept the developer's expert's assessment that no matter how much rock is found, it can be blasted and excavated. See *infra* text accompanying note 5. Similarly, there was testimony that it will take over two months to remove unneeded rock and soil from the site. Tr. I, 96, II, 24. There is no evidence

and rock removal is a well-developed, routine construction technique, and there are few if any conditions under which rock removal cannot be done safely if proper precautions are taken.⁵ Tr. II, 28. We have little concern with this procedure here, particularly since blasting is a procedure that is regulated at the state level, and no override of local requirements is at issue. See 527 CMR 13.00; also see Tr. II, 40.

B. Traffic Volume

In the Pre-Hearing Order, the Board also questioned possible effects on surrounding streets of traffic generated by the proposed development. Although the Board chose not to brief this issue, sufficient time was spent on it during the hearing that we believe we should dispose of it.

As was the case with several issues,⁶ the Board raised many questions about traffic

that any specific problems will be created by this, other than a certain amount of inconvenience to immediate neighbors, which is associated with all construction.

5. A more general issue is raised by the fact that the City of Woburn does not regulate blasting in any way. Tr. IV, 69. We would be inclined to apply local regulations concerning construction procedures—such as hours of operation—if they are reasonable and applied equally to affordable housing and market-rate housing. But in the absence of exceptional circumstances, we are reluctant to consider local concerns that the town has not previously chosen to regulate. See *Walega v. Acushnet*, No. 89-17, slip op. at 6, n. 4 (Mass. Housing Appeals Committee Nov. 14, 1990); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n. 3 (Mass. Housing Appeals Committee Jan. 16, 1991). Our approach is consistent with *Sealund Sisters, Inc. v. Planning Board of Weymouth*, 50 Mass. App. Ct. 346, 349, 737 N.E.2d 503, 506 (2000), in which the Court concluded that the effects of blasting and hauling 80,000 cubic yards of rock were not grounds for disapproval of a subdivision when the town had enacted no regulations governing these activities.

6. For instance, accessibility of the sidewalk along the access roadway under the American Disabilities Act (ADA) was raised for the first time during testimony before the Committee. Neither this issue nor issues of pedestrian access were clearly raised in the Pre-Hearing Order, which refers to the “single access drive for vehicles.” Pre-Hearing Order § I-1(B). But more important, the Board’s expert could only testify that “I think there are some standards, and I don’t know offhand ... what the minimum grade should be for wheelchair accessibility...” Tr. III, 58-59. Further, compliance with the ADA is a matter of federal law, and is not a local concern that could justify the denial of a comprehensive permit. See n.5, *supra*. And in any case, on rebuttal, the developer’s civil engineer testified that although final plans have not been completed, the sidewalk will comply with the federal law, which permits an 8.3% grade so long as there are nearly level landings every 30 feet.

volume, but did little in terms of providing affirmative proof to meet its burden. It focused primarily on the methodology used by the developer's traffic engineer. For instance, the Board's expert testified that the developer's methodology for traffic counts to evaluate traffic volume on Main Street was "totally unacceptable," although he went on to indicate both in his report and in his testimony that the results obtained were consistent with his own previous work. Tr. III, 38, 40, 51; Exh. 49, p. 2. Similarly, he expressed concern that the town had not been provided with projections for traffic generated by other development projects proposed in the area, and yet stated that "we concurred with that once we had that in our hands." Tr. III, 55. Clearly, the Board has not met its burden of proof with regard to any local concerns that might be related to traffic volume.

C. Intersection Design

Design of the intersection of the proposed development's access roadway and Main Street presents no unusual problems. Sight distances are good. Tr. II, 73-74. Levels of service (LOS) for turning movements are adequate during peak hours. Tr. III, 95. Traffic volumes, however, are fairly high on Main Street, and therefore consideration was given to various alternatives for accommodating vehicular turning movements in the safest and most efficient manner. The developer's original design was the simplest—a standard T intersection with no change in the two-lane (one in each direction) design of Main Street, and one lane in and one lane out of the site. The developer's expert testified that no change was

Tr. VI, 12, 15, 24.

Similarly, the Board mentioned concerns about pedestrian safety, particularly for children, as well as "bus stops, shelters, things of that nature," but detailed evidence of a hazardous condition was never presented. See Tr. III, 60-61, 64. To the extent that this issue was actually joined, the developer proved that there are acceptable locations for school bus stops near the development's parking lots. Tr. VI, 18, 30; cf. Tr. III, 122.

needed in Main Street since it is wide enough for northbound traffic to pass a car waiting to turn left into the site. Tr. II, 76-77. And he believed that a single lane exiting from the site (rather than two exit lanes and one entrance lane) is safer since two cars side by side can sometimes block each other's view of on-coming traffic. Tr. II, 77-78, 80. Nevertheless, at the request of the Board's engineer, a plan was prepared that showed a left-turn lane in Main Street and an extra lane in the entrance roadway. Tr. II, 76; Exh. 46-A. This design would not only make Main Street safer, but also improve the level of service (LOS) for vehicles leaving the site; that is, in heavy traffic, cars in two exiting lanes on the access roadway would not have to wait as long to enter Main Street as they would if they were in a single lane. Tr. II, 101-102. A second, compromise plan was also prepared with the left-turn lane, but the original, one-lane-in/one-lane-out design for the access road. Exh. 46-B.

Preliminary plans have been submitted to the Massachusetts Highway Department, which apparently prefers the compromise alternative. Tr. II, 78-79. The developer's expert also testified that this is "the best of both worlds." Tr. II, 105. The Board's expert expressed a preference for the first alternative (Exhibit 46-A). Tr. III, 72. He also testified, however, that "MassHighway would have control over what the conditions would be," and then later indicated that the final design would be subject to negotiation. Tr. II, 70, 75. The testimony shows that both alternatives are acceptable and safe, and design of the intersection presents no impediment to the approval of the affordable housing development. But because the intent of the Comprehensive Permit Law is to leave discretion in local hands whenever possible, we conclude that the intersection should be built to the specifications the Board prefers—Exhibit 46-A.⁷ See Tr. III, 70-77.

7. If the parties (and the Massachusetts Highway Department) continue to pursue alternative designs and agree upon a different, or even a new, even better alternative, that, of course, is also acceptable.

D. Access Roadway Design

The serpentine design of the proposed roadway is unusual, though not unheard of. See, e.g., *Capital Site Management Assoc. Ltd. Partnership v. Wellesley*, No. 89-15, slip op. at 24-35 (Mass. Housing Appeals Committee Sep. 24, 1992) (“steep serpentine road” approved), *aff’d* No. 96-P-1839 (Mass. App. Ct. Feb. 18, 1998). Each such design must be considered on its own merits.

The maximum grade on the roadway is 8%, which complies with Woburn subdivision regulations. Tr. I, 48; IV 12-13. The curves, however are sharp, ranging from 40 to 60 feet in radius, and do not comply with the city’s 100-foot radius requirement. Tr. IV, 13-17. The original design proposed by the developer was critiqued extensively by the Board’s experts during the local hearing process. Tr. III, 31-32; Exh. 49, p. 5; Exh. 51, p. 3. As a result, it was widened from the 26 feet required by local regulations to 28 feet, the curves were modified, and a five-foot level shoulder was added. Tr. I, 47, 52; III, 32, 83; IV, 11-12, 34; V, 16-17; Exh. 9, 10, 11. Further, a stable emergency surface with the trade name “Grasscrete” has been provided along both sides of the roadway, which, with the sidewalk and the roadway itself, creates a useable area for emergency vehicles that is 46 feet wide—an extraordinary width. Tr. I, 58-60. The developer’s design engineer testified that in terms of grade and curves, the design is adequate. Tr. I, 42-50. A traffic expert⁸ testified for the developer that the roadway is safe and adequate at a design speed of 15 miles per hour. Tr. V, 57-62. Thus, as noted previously, the developer established its prima facie case.

The Board introduced some testimony about the safety of the roadway for normal

8. Both the civil engineer who designed the roadway and the traffic engineer who reviewed it are registered professional engineers. Tr. I, 17; V, 53.

traffic. Without doubt, it showed that the design is not typical. Tr. III, 30. Its traffic engineer expressed concern that vehicles might travel faster than the planned 15-miles-per-hour speed limit, and noted that Woburn subdivision regulations require a design speed of 25 miles per hour. Tr. IV, 13, 15. But particularly in light of the same expert's testimony that curves discourage excessive speed, we find that there is insufficient evidence to meet the Board's burden with regard to safety concerns for everyday traffic. See Tr. IV, 38.

The Board focused considerably more attention on the question of the suitability of the main roadway for large vehicles, particularly under emergency circumstances, and the developer introduced a very thorough analysis of the relevant issues in response.

Although the fire chief expressed concerns about fire trucks passing other vehicles on the curves, the evidence shows that the city's largest fire truck, a 40-foot ladder truck can negotiate the roadway without at any point entering into opposing lanes of traffic. Tr. I, 45, 122, 139; III, 99; Tr. V, 58-64; Exh. 10; also see Exh. 39, 54, 55, 56; Tr. 27, 29-30. In fact, two such trucks could pass each other going opposite directions without encroaching on each others' lanes.⁹ Tr. V, 60. Similarly, a thirty-foot long delivery trucks or small moving vans will have no problem accessing the site. Tr. I, 123-124. Large semi-trailer trucks can use the roadway, though they will encroach somewhat on the opposing lane of traffic on some curves. Tr. I, 124. But the travel lanes are very wide—14 feet, which is 2 feet wider than the lanes on interstate highways. Tr. I, 47. In the unusual situation in which a large, interstate moving truck delivers furniture to a two-bedroom apartment, commonsense would indicate that a professional driver, observing the 15-mile-per-hour speed limit, will be able to negotiate the turns safely if there is a passenger vehicle traveling in the opposite direction.

9. It is by no means clear to us that some encroachment may not be acceptable in certain emergency situations.

The Board introduced no evidence to the contrary, and has failed to establish that such minimal concerns are sufficient to outweigh the regional need for affordable housing.

E. Emergency Access

The need for secondary, emergency access and its design are typically among the most difficult issues with which we are presented. In this case, although the developer maintains that its original design, showing only a single means of access, is adequate, secondary access at the rear of the property has been provided in response to the concerns of the Woburn Fire Department. Tr. I, 53; see Exh. 54; cf. Exh. 11, 9. The only question that remains, therefore, is whether the design—at a 14% grade—is acceptable.

Our previous cases shed little light on the matter. For example, in *Capital Site Management Assoc. Ltd. Partnership v. Wellesley, supra*, there was only a single access road, designed at a grade of 8%. But our analysis of the site and the roadway design was not as detailed as it might have been since the proposed roadway, which we approved, was “below the [9%] limit set in the subdivision control ordinance.” *Capital Site Management Assoc. Ltd. Partnership v. Wellesley, supra*, slip op. at 33, 34.

In the case before us, the developer’s design engineer testified that the 14% grade is acceptable and is in fact comparable to the slopes in the existing residential subdivision to which it connects. Tr. I, 53-57; also see Tr. V, 88, 91. A second traffic engineer testified on behalf of the developer that national design standards permit local roadway grades of up to 17%, and that the proposed emergency access road, so long as it is properly maintained in winter weather, is safe. Tr. V, 65-66, 81.

On direct examination, the Board’s first expert testified equivocally:

Q. ...please describe what issues... are presented by an emergency access drive with a 14% grade.

A. ... "14% is not desirable. You look at conditions in Maine, Vermont, New Hampshire, where roads are traditionally 10, 12%, 13, 14 like that, it's kind of accepted practice....

...And if an emergency vehicle entered the site, they would clearly enter from [the primary access road]. ...I see [the emergency access] as simply access [in] emergency conditions for people in and out of the site who are maybe presently here already....

Q. And do you anticipate any particular problems for... emergency vehicles negotiating a 14% grade?...

A. They're going to have problems before they get to Driftwood [Road¹⁰]....

Q. ...do you have an opinion as to whether or not the single-access drive... is a safe and adequate design for access and egress from the site?

A. I think it's addressed some of our concerns, but we still have some major issues with pedestrian and vehicle safety.

Tr. III, 88-90. The last answer is particularly telling. By its context, the question referred to the emergency access, and yet the answer (and the testimony following) was in generalities and returned to the question of pedestrian safety on the primary access road.

The Board's second expert testified similarly:

A. 14% is normally a very high grade.... We would normally like to see something maybe in the 8 to 10% range.... [In] icy conditions, ... you definitely would need maintenance on that to provide the proper vehicle access.

Q. Do you have an opinion as to whether the ... access for emergency vehicles... is safe and adequate?

A. It's not desirable. ...if they did go with that steeper grade, you have a lot of maintenance issues....

Tr. IV, 24, 31.

Based upon this testimony we conclude that the Board has not met its burden of proving that a short emergency access roadway with a grade of 14% is of sufficient local concern to outweigh the need for affordable housing. We will, however, impose a condition requiring that a maintenance plan be prepared specifically for the emergency access roadway.

10. Driftwood Road is the existing subdivision road to which the emergency access road will connect.

See § IV-2(b), below.

F. Parking Configuration

The proposal originally included 340 parking spaces, in compliance with the Woburn Zoning Ordinance, which requires parking spaces at a ratio of 2.0 spaces per housing unit. Tr. VI, 31, 33; Pre-Hearing Order, §§ I-11. When secondary, emergency access was added to the proposal, 9 parking spaces were lost, leaving a total of 311 spaces. Tr. VI, 33. Before the Housing Appeals Committee, the Board contested the layout of the outdoor spaces. That is, the parking lots were designed with right angle parking with a 20-foot aisle between the rows of parked cars. Exh. 9; Tr. III, 44. Even though the traffic in the lots will be one-way, the Board's expert testified that he would prefer to see a 23, 24, or even 26-foot aisle or else angled parking. Tr. III, 44, 50.

During the hearing, the developer responded by preparing an alternative proposal using parking angled at sixty degrees. Tr. VI, 8. This would result in a further reduction of 31 spaces, for a total of 300 spaces, which represents about 1.8 spaces per unit. Tr. VI, 9, 11. The Board's own expert found, based upon studies of similar developments in other towns, that the peak demand would require a ratio of less than 1.5 or 239 parking spaces. Tr. III, 41; Exh. 49, pp. 2-3. Thus, 300 parking spaces is clearly sufficient.

The Board's preference for a wider aisle appears to be more a matter of convenience than safety. Tr. I, 66; III, 106. But angled parking is also conducive to one-way traffic, which the parties have agreed is desirable. Tr. III, 44. We will therefore require that the alternative plan with angled parking be implemented. See § IV-2(c), below.

IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Woburn Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) The development shall be constructed as shown on drawings entitled "Woburn Heights," dated 9/29/00, revised 7/18/01 (sheets C-2, C-3, PD-2, C-4, A301), prepared by Allen & Major Associates, Inc. (Exhibits 9, 12,13, 24,31).

(b) A separate maintenance plan for the emergency access roadway shall be submitted to New England Fund monitoring agent for approval prior to construction, with enforcement of the requirements of that plan available under zoning or similar local procedures and by the monitoring agent.

(c) A total of 300 parking spaces shall be provided, and outdoor parking spaces shall be designated at an angle of sixty degrees from the direction of traffic flow.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

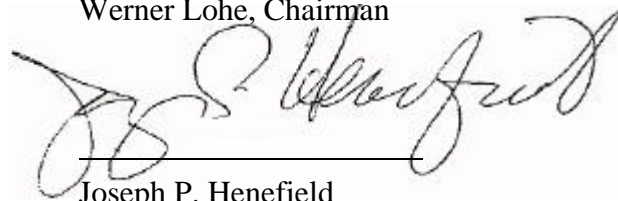
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee


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Werner Lohe, Chairman

Dated: June 11, 2003

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Joseph P. Henefield

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Marion V. McEttrick

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Frances C. Volkmann